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Timothy W. Silbaugh

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# APPORTIONMENT PROBLEMS IN LOCAL GOVERNMENT

## I. Introduction

American urban areas are beset by many and varied problems. They have not been solved largely because of the inability of inefficient and haphazard clusters of governments to develop and apply area-wide programs.<sup>1</sup> Thus, consolidation and reorganization have been sought. The inefficiency of the many controlling bodies is largely the result of historical development wherein small communities have outgrown and made functionally useless boundaries to which political adherence is still found. Even so, political autonomy is part of the social climate of each community and is valued by many of the residents. In today's metropolitan society with huge impersonal bureaucracies, a local government that is parochial gives the constituents an important feeling of political efficacy. Many localities have rejected the idea of consolidation, or at a minimum, have bargained for some measure of autonomy. Additionally, suburbanites often express fear of an urban majority and maintain they must have equal representation as a "community." Quite often in consolidations of past years those demands have been met by districting along "community" boundaries and assigning to each a representative. As a rule, however, these districts have been made up of greatly varying populations, causing malapportionment.

Litigation dealing with local apportionment has been plentiful. Many voters have claimed that by living in more populous districts their votes are unconstitutionally debased.<sup>2</sup> As a result, the Supreme Court has applied the equal protection clause of the fourteenth amendment to local government elections.<sup>3</sup> While decisions of the past few years appear conceptually conflicting, a general trend can be perceived.

## II. Judicial Approach to Voter Apportionment

In 1962 in *Baker v. Carr*<sup>4</sup> the Court held that a voter's challenge of an apportionment statute was justiciable, thus making it clear that a federal court had the power to determine whether such a statute is valid. No firm standards were articulated, however, and it was implied that a state legislative apportionment scheme had only to meet the test of minimum rationality.<sup>5</sup> If this were true, then as Justice Frankfurter charged in his dissent, the Court was indulging "in mere empty rhetoric, sounding a promise to the ear, sure to be disappointing to the hope."<sup>6</sup> Two years later the implication proved incorrect; in *Reynolds v.*

1 See COMMITTEE FOR ECONOMIC DEVELOPMENT, *RESHAPING GOVERNMENT IN METROPOLITAN AREAS* (1970).

2 It is questionable whether local government units as they are often formulated could be responsive to the needs of the people. It has been noted that malapportionment on the local level is more severe than it was on the state level, and that government stagnation is more rank than it has ever been on the state level. McKay, *Reapportionment and Local Government*, 36 GEO. WASH. L. REV. 713, 713-14 (1968).

3 *Avery v. Midland County*, 390 U.S. 474 (1968).

4 369 U.S. 186 (1962).

5 Mr. Justice Brennan wrote that a discrimination reflects no policy, but simply arbitrary and capricious action. *Id.* at 226. See Note, 72 YALE L.J. 968, 970 (1963).

6 369 U.S. at 270.

*Sims*<sup>7</sup> the Court declared that a qualified voter has a constitutional right to vote in elections for state legislators without having his vote wrongly diluted or debased.<sup>8</sup> It was held that "[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as races."<sup>9</sup> Following *Reynolds* many lower courts extended the "one man, one vote" principle to local levels of government.<sup>10</sup> In 1968 the Supreme Court followed suit in *Avery v. Midland County*,<sup>11</sup> holding that since local governments are an exercise of state power through subordinate agencies, unequal districting within them is violative of the equal protection clause of the fourteenth amendment.<sup>12</sup>

The fear expressed by Justice Harlan in his dissenting opinion in *Avery*, that the determination would have "undesirable 'freezing' effects on local government,"<sup>13</sup> is shared by others.<sup>14</sup> It is clear that these critics have rejected the basic underlying value defined in *Baker* and implemented in *Reynolds*—that apportionment according to population is a basic principle of representation in a political democracy.<sup>15</sup> In recognition that such a principle is not the only permissible basis for political representation, Justice Frankfurter in his dissent in *Baker* maintained that the Court ought not "... choose among competing bases of representation—ultimately, really, among competing theories of political philosophy. . ."<sup>16</sup>

It was the belief of Justices Harlan and Stewart that representatives in government ought to represent groups and interests.<sup>17</sup> The primary problem

7 377 U.S. 533 (1964).

8 *Id.* at 579.

9 *Id.* at 568.

10 One man, one vote was applied to city councils. *E.g.*, *Kapral v. Jepson*, 271 F. Supp. 74 (D. Conn. 1967); *Newbold v. Osser*, 425 Pa. 478, 230 A.2d 54 (1967). It was also applied to county boards. *E.g.*, *Martinovich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966); *Montgomery County Council v. Garrett*, 243 Md. 634, 222 A.2d 164 (1966).

11 390 U.S. 474 (1968).

12 *Id.* at 479, 484-85.

13 *Id.* at 492-95.

14 *See, e.g.*, Martin, *Local Reapportionment*, 47 J. URBAN L. 345, 352 (1969-70).

15 377 U.S. at 565.

16 369 U.S. at 300.

17 Justice Harlan made his position clear dissenting in *Reynolds*, 377 U.S. at 623-24.

It is surely . . . obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a state can only be adjusted by disregarding them when voters are grouped for purposes of representation.

Justice Stewart explained his theory of representation in his dissent in *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 749-51 (1964).

Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate . . . . [Legislators] represent people, or, more accurately, a majority of the voters in their districts—people with identifiable needs and interests which . . . can often be related to the geographical areas in which these people live. The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests . . . .

with this approach is identifying the interests around which people are to be grouped. Our electoral system is organized on the basis of geography. Although Harlan and Stewart appear to accept geographic districting, they never reconcile territorial constituency with their preference for interest representation. Actually, each legislative district has within it groups of various and conflicting economic and social needs. Furthermore, few voters can identify their interests with groups wholly within a single district. Even if some district-wide desires can be found, it cannot be assumed they transcend others in importance. It is clear interests are too diverse in even a small area for an elected official of any general purpose government to represent a defined interest group. Ultimately he represents unique persons who have various and often conflicting group pressures influencing their voting. It is more consistent with the American political scheme to say that the basis of pluralistic thought is not interest representation within the policy making branch of government, but rather interest groups making known their desires upon policy makers selected by people.<sup>18</sup>

This is not to say that in districting political subdivision lines ought not to be taken into account. Certainly, inhabitants feel greater identity as part of a defined constituency than as part of a purely arbitrary division reflecting the result of mathematical exactitude. To this end the Court has made it clear that an attempt may be made to have electoral districts coincide with political subdivisions.<sup>19</sup> However, this is not the same as a conscious effort to construct districts such that the weight of a person's vote is dependent upon where he lives. Even if it were true that an urban majority could place onerous terms upon a suburban minority, such rationale offers no basis for permitting a minority of voters with no discernible common interest to gain a disproportionate voice in local government.

The principle of one man, one vote is a logical and desirable concomitant to representative assembly in a democracy. No reason consistent with the ideals of equality and majority rule appears to effectively refute the principle.<sup>20</sup> As stated in the *Reynolds* decision, the equal protection clause demands no less.<sup>21</sup> Since *Reynolds*, the Court has consistently held that substantial equality is required. In *Avery* the Court concluded:

The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds v. Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect mem-

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The fact is . . . that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important good of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a state. . . .

18 Even without geographic districting it would be incongruous for a polity to begin the preamble to its constitution with, "We the people . . ." and yet deny "the people" a voice in the legislature by calling for interest representation. One who could not identify with an interest would be precluded from taking part in the formation of government policy.

19 See text accompanying notes 39-45 *infra*.

20 For a discussion comparing the underlying values responsible for the reapportionment decisions with those that militate against the decisions, see Auerbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value*, 1964 THE SUPREME COURT REVIEW 1.

21 377 U.S. at 565.

bers of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.<sup>22</sup>

Because the right to equal representation defines basic rules of the government process, strict scrutiny of legislation affecting it has been the applicable judicial standard of review. Under this review, exacting judicial examination of the effect of any particular apportionment scheme and the legislature's rationale therefor is made. The *Reynolds* Court stated that "[e]specially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."<sup>23</sup>

A more recent case, *Kramer v. Union School District*,<sup>24</sup> although dealing with voter qualifications rather than apportionment, is generally held to apply to the voting rights area as a whole.<sup>25</sup> There the Court stated that "the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions [is] not . . . applicable."<sup>26</sup> Thus, the state is given very little latitude and is forced to apply equal apportionment unless there exists a compelling state interest that requires another type of voting.<sup>27</sup>

22 390 U.S. at 484-85.

23 377 U.S. at 562.

24 395 U.S. 621 (1969).

25 For a discussion of *Kramer* and its feared application in the equal protection area, see Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School District*, 15 ARIZ. L. REV. 457 (1973).

26 395 U.S. at 627-28.

27 Here it must be noted that throughout the voting rights cases a caveat is found which holds that there may be some cases in which an election is for functionaries whose duties are so far removed from normal government activities, and so disproportionately affect different groups, that a popular election in compliance with *Reynolds* is not required. See, e.g., *Hadley v. Junior College District*, 397 U.S. 50, 56 (1969). Until recently this appeared elusive for *Reynolds* standards were implicitly applied to school districts (*Kramer*), to the issuance of general obligation bonds (*Phoenix v. Kolodziejski*, 399 U.S. 204 (1971)), and to the issuance of public utility revenue bonds (*Cipriano v. Houma*, 395 U.S. 701 (1969)). However, in *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973) and *Associated Enterprises, Inc. v. Toltec District*, 410 U.S. 743 (1973) it was held that because of a water irrigation district's limited purpose, and due to the disproportionate effect of its activities on landowners as a definable group, the statutes under attack do not violate the equal protection clause by limiting the vote to district landowners and denying it to nonlandowner residents or by weighting the votes according to the assessed valuation of the land.

It is clear from *Salyer* that where the caveat is met the Court will apply only a minimum scrutiny test. It was stated that residents are "entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents while granting it to landowners was 'wholly irrelevant to achievements of the regulation's objectives.'" 410 U.S. at 730 quoting from *Kotch v. Pilot Commissioners*, 330 U.S. 552, 556 (1947). In other words if a legislature may have a rational basis for a voting scheme, such will be upheld by the courts upon a showing that the election involves activities far removed from normal government functions and disproportionately affects different groups. In these cases the Court found that the issue involved landowners as a definable group, and apparently that as the amount of land one owns increases so does his interest. Therefore, the state may rationally determine that those most interested ought to have control. The parameters of the caveat beyond the facts of these two cases remain to be found. It is clear, however, that two factors carried considerable weight. First of all, the purpose of the district (irrigation) was to serve the land, and landowners only were directly involved. Secondly, funds for the service came from landowners which were assessed on acres of land. Thus, others were not involved directly in either the costs or the benefits of the district.

### III. Standards of Equal Apportionment Set

There is a need for an articulation of the standards necessary to achieve "equal apportionment." Ideally, it would mean strictly one man, one vote. It is readily apparent, however, that such a standard is not possible with today's shifting populations. In *Wesberry v. Sanders*<sup>28</sup> it was held that "*as nearly as is practicable* one man's vote in a congressional election is to be worth as much as another's."<sup>29</sup> The *Reynolds* Court announced that a state must make "an honest and good faith effort to construct districts . . . *as nearly of equal population as is practicable*."<sup>30</sup> Thus, the same standards were set for all elections. In *Swann v. Adams*<sup>31</sup> the Supreme Court invalidated a Florida legislative apportionment plan noting there was a failure to articulate acceptable reasons for the variations among populations of the various legislative districts.<sup>32</sup> Thus, any deviation requires justification. In *Reynolds* it was also made clear that:

In the apportionment of seats in a state legislature it is constitutionally permissible to follow political subdivision lines in establishing legislative districts so long as the resulting apportionment is one based substantially on population and the equal protection principle is not diluted in any significant way.<sup>33</sup>

It was clear that political subdivision lines were to be subordinate to the aim of one man, one vote; and they were sacrificed in later decisions in order to obtain among voting districts as small a variance in population as possible. In *Kirkpatrick v. Preisler*<sup>34</sup> and *Wells v. Rockefeller*,<sup>35</sup> two later congressional district cases, the Court applied the previously enunciated "as near as practicable" standard. In *Kirkpatrick* the Court stated that "the State must justify each variance, no matter how small,"<sup>36</sup> and further held that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people."<sup>37</sup> The Court here made clear that the aim is for no variation in population among districts and that picking a cutoff point at which population variances become *de minimus* is both arbitrary and self-defeating.<sup>38</sup> If a *de minimus* range is chosen, the objective would no longer be zero deviation. Nevertheless, recent decisions of the Supreme Court have expanded the meaning of equal apportionment to just such a range.

28 376 U.S. 1 (1964) (emphasis added).

29 *Id.* at 7-8 (emphasis added). It should be noted that in enunciating this principle the court was interpreting Article I, § 2 of the Constitution which provides that representatives be chosen "by the people of the several states."

30 377 U.S. at 577.

31 385 U.S. 440 (1967).

32 *Id.* at 443-44. It is doubtful that this plan with a variation of 30% among districts would have withstood any test.

33 377 U.S. at 578.

34 394 U.S. 526 (1969). A variance of 6% was determined to be unconstitutionally large.

35 394 U.S. 542 (1969). A plan with a 13% variance was struck down.

36 394 U.S. at 531.

37 *Id.* at 533.

38 *Id.* at 531.

## IV. An Erosion of Standards

In *Abate v. Mundt*<sup>39</sup> a plan was approved creating a county legislature with districts corresponding to the county's five towns, one legislator being assigned to the smallest town and the number of legislators for each other town computed by multiplying the number of times each other town's population exceeded that of the smallest. Although the plan was devised to preserve town-wide representation, and yet keep deviations from equal representation as small as possible, a total voting inequality of 11.9% resulted.<sup>40</sup> The decision conflicts with the language of *Kirkpatrick* and indicates the Court was developing a new definition of equal apportionment for local governments separate from that of congressional elections.<sup>41</sup> In *Abate* the Court balanced the mandate for one man, one vote against several factors. Among them was the history of close cooperation between the county and constituent towns. This was coupled with the fact that the same individuals occupied governing positions in the towns and the county resulting in strong interdependence.<sup>42</sup> Perhaps the most significant factor considered by the Court was "that the plan had no built-in bias tending to favor particular political interests or geographic areas."<sup>43</sup> In effect, *Abate* stands for the rationale of preserving the integrity of existing political subdivisions as a justification for deviance in voting equality. With this case equal apportionment in local government becomes no longer a call to a one man, one vote standard but a concept that evolves out of balancing whatever relevant factors come into play against the one man, one vote concept.<sup>44</sup> In this case the relevant factors

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39 403 U.S. 182 (1971).

40 *Id.* at 184.

41 Interestingly enough, in the term previous to that of *Abate* the Court stated in *Hadley v. Junior College District* that "[i]t should be remembered . . . we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election regardless of the officials selected." 397 U.S. at 55.

42 403 U.S. at 186.

43 *Id.* at 187. The Court here was referring to *Hadley*, decided the previous year. There an apportionment scheme for a junior college district was struck down because of a built-in bias favoring smaller districts. Six trustees were to be elected, and if no subdistrict had 33 1/3% or more of total school age population of the total district then all were to be elected at large; if one or more districts had between 33 1/3% and 50%, each such subdistrict would elect two trustees and the rest were to be elected at large from the remaining subdistricts; if one had between 50% and 66 2/3% of school age population, it would elect three trustees; and if a subdistrict had more than 66 2/3% it was to elect four trustees. 397 U.S. at 56-57. The voters of larger districts had their votes diluted unless they had exactly 33 1/3%, 50%, or 66 2/3% of the total enumeration. The Court held the scheme could not be sustained because it did not sufficiently comply with the "as far as practicable" standard. *Id.* at 57.

It would appear that a scheme wherein those districts having between 25% and 41 2/3% of school-age population would elect two of six trustees, a district having between 41 2/3% and 58 1/3% would elect three of six trustees and a district with over 58 1/3% would elect four trustees may be constitutionally accepted under *Mundt* rationale because the scheme would not discriminate. Nevertheless, to each voter the discrimination would be just as evident because any district not having exactly 33 1/3%, 50% or 66 2/3% would be malapportioned. Thus, the *Mundt* rationale appears to ask simply if the discrimination is haphazard or systematic in scheme, not whether a voter's voice is diluted.

44 The Court stated there was no implication that "even these factors could justify substantially greater deviations [more than 11.9%] from population equality." 403 U.S. at 187. However, in *Mahan v. Howell*, 410 U.S. 315 (1973), a deviation of 16.4% was upheld. See text accompanying notes 46-54 *infra*.

proved to be a history of close cooperation and "the need for intergovernmental coordination [which] is often greatest at the local level."<sup>45</sup>

In *Abate* the Court struck a new path in political theory for reapportionment cases. This holding, while explicitly compromising voter representation and implicitly rejecting interest representation, institutes political entity representation.

The Supreme Court's most recent efforts in state voter apportionment include *Mahan v. Howell*.<sup>46</sup> The question here arose from statutes of the Virginia General Assembly which apportioned districts for the purpose of electing members to the House of Delegates. They were attacked as violative of the equal protection clause due to an impermissible population variance among the districts. The Court held a 16.4% variance to be within constitutional boundaries where the divergences were based upon "legitimate considerations incident to the effectuation of a rational state policy."<sup>47</sup> The large variance resulted from the state using political subdivision lines for voter districting. The Court took notice of the fact that the state legislature had the power to enact local legislation, and found it rational for the electoral districts to follow political subdivision lines for it facilitated enactment of legislation affecting single communities.<sup>48</sup> Therefore, it was concluded that since the apportionment plan was consistent with a valid state policy,<sup>49</sup> the variance was permissible. The Court was evidently building upon the *Abate* decision, and much of the rationale in *Mahan* applies to local governments as well as state legislatures. A narrow interpretation of the case may limit its applicability in metropolitan government.

Although the expansion of standards would make consolidation more attractive to suburbs by permitting them to have greater voice, important considerations of this decision must be noted. Since it appears that districts must reasonably follow political boundaries if the policy is to accomplish subdivision representation, where there is great disparity in populations the policy could not be given effect without emasculating equal apportionment altogether. Also, combining areas haphazardly to achieve a semblance of equality would be inconsistent with the policy of political subdivision representation and thus be suspect. Furthermore, as made clear in *Abate*, a blatant effort to favor particular geographical or political interests would cause the apportionment plan to fail. Finally, the basis for the state policy in *Mahan* (subdivision representation so that local legislation could be effected more efficiently) is the antithesis of the rationale for consolidated local governments. Consolidation loses purpose if parochialism is

45 403 U.S. at 186.

46 410 U.S. 315 (1973).

47 410 U.S. at 325. It is interesting to note that the district court found that by using a computation method previously approved by the Supreme Court in *Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967), one district was overrepresented to such an extent that the actual variance was 23.6%. 330 F. Supp. 1138 (E.D. Va. 1971). Under the state method, however, the lower deviation was found. The district court held that it did not make any difference which calculation was used, that neither variance was acceptable. *Id.* at 1139-40, n.1. The Supreme Court declined "to enter this imbroglia of mathematical manipulation" and used the lower variance figure. 410 U.S. at 319 n.6. See Justice Brennan's dissenting opinion. *Id.* at 336, 337.

48 *Id.* at 325-26.

49 *Id.* at 328.



insured. There is a substantial difference between assuring those in suburban areas that their votes will be worthwhile and a conscious effort to maintain parochial division in local government. The objective of consolidation is to develop relevant substantive programs designed to deal with metropolitan problems through a realization of local as well as metropolitan needs. Local government ought not be a vehicle by which community leaders can protect their interests.<sup>50</sup>

More importantly, the Court explicitly stated in *Mahan* that there are two different standards for equal apportionment: (1) strict mathematical equality standard for apportionment of congressional districts, and (2) rational state policy standard for state and local apportionment. The reason given by the Court for different tests was that application of the stricter standard "may impair the normal functioning of state and local government."<sup>51</sup> The standard for these governmental entities is still substantial equality; however, it is expanded to take into account a rational state policy that may cause deviations in the one man, one vote standard. It is clear that where the Court uses the criterion of "rational state policy," the minimum scrutiny applied in other equal protection contexts is to be applied in this area as well, so long as the variance is within an allowable range.<sup>52</sup> However, substantially equal voting is still a fundamental right protected by the compelling state interest test. The Court stated that "... a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality."<sup>53</sup> Nevertheless, it appears that a state will have little difficulty in obtaining approval for malapportioned districts within an allowable variance (at least 16%) as long as some policy can be shown, and the apportionment is consistent with that policy.<sup>54</sup>

Finally, two cases handed down by the Court in June of 1973 adopted a *de minimus* standard by which equal apportionment can be met for state and local elections. In *Gaffney v. Cummings*<sup>55</sup> and *White v. Regester*<sup>56</sup> it was held that variations reaching 7.9% and 9.9% respectively are permissible without the requirement of a rational state policy to bolster them. The Court reiterated statements made in previous cases: that the equal protection clause requires districts as nearly of equal population as possible; that a state must make an honest and good faith effort to construct legislative districts as nearly of equal

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50 See note 1 *supra*. Also, it must be noted that *Abate* was an irregular situation in this area. Rather than there being a history of cooperation in most metropolitan areas, consolidation is sought because local bodies are unable to work together.

51 410 U.S. at 323. The Court made it clear that the Article I, § 2 constitutional mandate for congressional elections is a stricter standard than that which is to be applied to the states under the equal protection clause.

52 The Court stated, "We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with political subdivisions is irrational." *Id.* at 325-26.

53 *Id.* at 326.

54 See Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973), for a critique of the double standard of judicial review in application of equal protection depending upon whether or not a fundamental right is involved.

55 412 U.S. 735 (1973).

56 412 U.S. 755 (1973).

population as practicable;<sup>57</sup> and that an individual's right to vote is unconstitutionally impaired when his or her right is in a substantial fashion diluted compared to the vote of citizens living in other parts of the state.<sup>58</sup> In both cases, however, the Court basically held that "minor deviations" from mathematical equality of population among state legislative districts are insufficient to make out a *prima facie* case of discrimination under the equal protection clause, and therefore, no justification is required of the state.<sup>59</sup> In *Gaffney*, the Court recognized the purpose of the districting was to achieve statewide political party equality. It responded by stating that "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan would be sufficient to invalidate it."<sup>60</sup> Although the state in *White* was unable to offer any "acceptable justification" for a 9.9% variance, the apportionment was upheld based upon *Gaffney*.<sup>61</sup> It was noted, however, that larger differences between districts very likely would not be tolerable without justification based upon a rational state policy.<sup>62</sup> These cases present a considerable mutation from the one man, one vote rule in *Reynolds*. Although other decisions indicated that digressions from the standard were possible, such digressions had to be accompanied by a rational justification. Now it is indicated that a state need not justify every variance among state voting districts. Deviations below 10% are simply constitutionally insignificant.

It is interesting to note that in *Gaffney* the Court based its rationale partly upon the fact that many apportionment plans were submitted by various bodies. Each was an attempt to achieve smaller variance based upon a census that itself is accurate for only an instant and very questionable over a ten-year period.<sup>63</sup> In reflecting upon the *Reynolds* holding, the Court stated:

This is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. . . . [I]t is apparent that such representation does not depend solely on mathematical exactitude among district populations.<sup>64</sup>

The rationale loses persuasion when it is seen that in a congressional districting case handed down by the Court the same day, three different districting plans were reviewed and it was held that a deviation of 4.1% was unacceptable where another plan existed that limited variations to .16%.<sup>65</sup> Furthermore, though the Court shows a disdain for the exact numbers approach, it implicitly relies upon

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57 412 U.S. at 743.

58 *Id.* at 744.

59 *Id.* at 751.

60 *Id.* at 752.

61 412 U.S. at 764. "We cannot glean any equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9% when compared with the ideal district." *Id.*

62 *Id.*

63 412 U.S. at 745. The population of a district is just not that knowable to be used for such refined judgments.

64 *Id.* at 748-49.

65 *White v. Weiser*, 412 U.S. 783, 797 (1973).

a fixed percentage when it decides what values are to be *de minimus*. When considered against *Hadley v. Junior College District*,<sup>66</sup> where the Court held an apportionment plan invalid because it appeared to discriminate against a definable group, the *de minimus* concept becomes even more questionable. If the Court were to find a 10% variance between all urban and rural areas, it would find discrimination and based upon *Hadley* demand reapportionment. However, if the same malapportionment were to be found haphazardly distributed, it would be upheld. In such an instance the Court actually substitutes equal protection for perceived geographical interests in place of that of voters. The question should not be whether an area has its voting strength diluted, but whether voters as individuals have their votes diluted.

### V. The Present Status of Reapportionment

It is clear now that substantial equality can be satisfied by different methods in state and local government apportionment. If the variance among districts is less than 10%, a *prima facie* case of substantial equality is established.<sup>67</sup> If the state or local government can show a rational basis for its districting scheme, at least a 17% variance will be upheld. Plans with a variance much greater than 17% will probably fail to pass the substantial equality test. The major development in recent cases is that no longer does districting have to meet the one man, one vote test, but rather a wide margin of error is afforded.<sup>68</sup> Mr. Justice Marshall noted in his dissent in *White* that between 1969 and 1973 the range of variances among state legislatures had been cut dramatically. Prior to 1969, variances of over 15% could be found in more than 44 state legislatures. By 1973, in almost one half of the states, the total variance of senatorial and house districts was found to be very near or below 5%.<sup>69</sup> He predicts that such gains will be lost by these decisions.<sup>70</sup>

A question that remains to be answered is why the Supreme Court has qualified itself on the one man, one vote concept. Certainly the change in the Court's makeup has had an effect. Chief Justice Warren and Justice Black both voted consistently for the one man, one vote rule. The newer members view reapportionment differently and a contrasting majority has formed. Primarily, the Court is responding to the many critics of the rule.<sup>71</sup> A discussion of the criticisms cast at the one man, one vote rule will show them to be largely without merit in the local government context.

66 397 U.S. 50 (1970).

67 The figure of 10% is used here because in *White* it was noted that the 11.9% variance of *Mundt* required a rational state policy. 412 U.S. at 762.

68 See Justice Brennan's dissenting opinion in *White* at 779.

69 *Id.* at 70.

70 *Id.* at 781.

71 Mr. Justice White, in *Gaffney v. Cummings*, commented on the problems of the one man, one vote concept and directed the reader to a publication of essays discussing the problems. 412 U.S. at 749 n.15.

## VI. Criticisms of One Man, One Vote Rule

A. *An Ineffective Force for Policy Change*

There may be some truth to the claim that the amount of apportionment litigation has been great because any voter feeling cheated can bring an equal protection claim if there is a variance. Nevertheless, one must seriously question such an argument. Although the volume of litigation has been high, to compromise a constitutional protection merely to reduce it is unduly pragmatic.

Professor Bickel has made it clear that he favors interest and group representation consideration in apportionment schemes as advocated by Justices Harlan and Stewart.<sup>72</sup> Additionally, he claims that the reapportionment decisions have produced no discernible change in political power and that no new majority has appeared that has made more democratic the system of government.<sup>73</sup>

Other writers who agree with Professor Bickel feel that the crucial question in apportionment is whether one man, one vote makes any difference in political policy output. They look at the policy decisions of legislatures whose members are elected on a one man, one vote basis. They then carefully compare those policies with those of legislatures based upon malapportioned constituencies. Most have found no discernible difference,<sup>74</sup> and the claim arises that since the concept has no effect upon output, it is inconsequential and ineffective in our political scheme. These findings may be true, though there are those who dispute them.<sup>75</sup> Nevertheless, the corollary that one man, one vote is of no use does not necessarily follow. The value of equal apportionment is realized in another equally important context. It should be viewed not as having the purpose of affecting policy output, but as an expression of belief in our political system. Elections *are meaningful* to those who vote. It is a matter of political efficacy and institutional ideals. In a sense the form itself becomes the overruling influential value. The Supreme Court decisions should be viewed from such a perspective. The premise upon which our political system in the United States is built is that people can effect change. The ritual of representative government has much significance. No one doubts that interests and groups have an important impact on output through lobbying. The individual, however, has only one link with government policy. To undermine that link is to take away any political efficacy he may have. If there is any right that the Constitution ought to protect, it is the voting right. Since the equal protection clause mandates that people situated alike are to be treated alike and since there is no more important event in the political process to the individual than voting, each person's vote ought to be weighted equally.

72 Bickel, *The Supreme Court and Reapportionment*, in REAPPORTIONMENT IN THE 1970's, 57, 72 (N. Polsby ed. 1971).

73 *Id.* at 58.

74 See Bickel, *The Effects of Malapportionment in the States — A Mistrial*, in REAPPORTIONMENT IN THE 1970's, 151, 151-54 (N. Polsby ed. 1971).

75 See Bickel, note 74 *supra*.

### B. *Complication to Regional Government*

An argument made by others, including Professor Dixon, is that by equalizing population in voting districts the Court is putting a "constitutional complication" in the quest for regional governments. These writers claim that only by affording some constituents extra voting power can they be induced to join with others for mutual advantage. It is thought that without granting such an advantage, broad local governments will be unable to acquire area-wide cooperation.<sup>76</sup> Although it may be true that urban leaders are willing to trade the weight of their constituents' votes for consolidation with the suburbs, it is also true that those in the urban areas cannot be denied equal protection of the law. Equal protection is a personal right applying to individuals. It is a guarantee that each person will be treated equally with other persons. Neither groups nor interests are guaranteed such a right. The court, in mandating equal apportionment, confirmed a fundamental principle of political organization that is valid regardless of the results produced. When equal voting is compromised so is the entire system. Thus equal apportionment cannot be said to be a constitutional complication, but rather it is a given—a basis from which localities must work in designing election schemes. Although it may be an impediment to minority control, it is not a vehicle by which majorities will necessarily impose onerous terms on a minority. Few would maintain that the smaller number should have the most effective voice; rather it is a desire that the minority not be imposed upon. Such can be accomplished within the one man, one vote concept. The problem lies not with constitutional protections, but in the inability of conventional election machinery to transfer voting strength into representative strength. In most local elections the candidate who wins the highest number of votes "takes all." Those who support another candidate find themselves without representation even though their numbers may be substantial.

### C. *A License to Gerrymander*

Another problem that has always been evidenced in the United States, gerrymandering, is said to have increased lately as a result of the reapportionment decisions. The argument is that when redistricting is done on a grand scale and those doing the redistricting have only to assure the courts that the districts are contiguous and have equal population, the potential for shaping districts so that they are most favorable to those doing the districting is maximized. Therefore, it is said, the Court should permit other factors to be considered in reapportionment.<sup>77</sup> Although these arguments may be accurate, it seems difficult to understand how returning to political boundary lines as the basis for districting will result in a correction of gerrymandering. Certainly it is not a new concept that only recently has reared its ugly head. One way or another, it is not necessary to make a choice between one man, one vote, and all the evils that appear

<sup>76</sup> Dixon, *The Court, The People and "One Man, One Vote"* in REAPPORTIONMENT IN THE 1970's 7 (N. Polsby ed. 1971). See also Bickel, note 72 *supra*.

<sup>77</sup> See Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970's 121 (N. Polsby ed. 1971).

to result from massive reapportionment. In local government there are effective alternatives to the single-member, winner-takes-all election scheme.

### VIII. Effective Alternatives

In *Dusch v. Davis*<sup>78</sup> the Supreme Court upheld a viable solution to the dilemma Professor Dixon fears. A Virginia Beach consolidation plan was upheld under which the city's eleven councilmen were elected at large, but at least one of the councilmen was required to reside in each of the seven boroughs. The boroughs were varied in makeup with three being urban, three being rural, and one being tourist.<sup>79</sup> Under this type of plan the one man, one vote mandate is preserved, for each vote is weighted equally; yet the residency requirement assures representation of any regional interests. Each community is given a voice in the area government, thus providing each voter with someone who is "his" representative. Since political strength would emanate from the area where he makes his home, each representative would necessarily be favorable to those within his community. Nevertheless, he would have to have metropolitan interests amenable to a majority of all the voters. Thus, to a great extent parochialism as a problem in metropolitan government is overcome because particular geographical issues, whether urban or suburban, would be presented in an accommodating manner. At the same time, voter efficacy and community identity are maintained. Although this plan would be successful where there are thought to be regional interests, it would be a threat to any minority not solidified in an area. That defect, however, goes to the institution of winner-takes-all elections, which are widely used in the United States, not to any defect in this scheme. In any event, the usual problem of inability of regional minorities to gain representation which is inherent in at-large districting is solved here.<sup>80</sup> In effect, this plan would produce an atmosphere of cooperation among the communities in an area and thus be conducive to area planning.

Other modifications to at-large voting in local governments can insure representation of minorities. Pennsylvania has instituted one such modification by using limited voting in its elections for county commissioners. Three commissioners are elected at large for each county; however, each voter casts a ballot for only two of the three candidates.<sup>81</sup> Under this scheme each person has the same voting strength, therefore the equal protection clause is satisfied.<sup>82</sup> The scheme encourages a fairer representation than would otherwise result, for any substantial minority, whether or not geographically solidified, is guaranteed a representative.

Cumulative voting, the inverse of limited voting, is used in the Illinois house elections.<sup>83</sup> In cumulative voting each elector has as many votes as there are

78 387 U.S. 112 (1967).

79 *Id.* at 113.

80 The scope of this note does not include the problems incurred in an unmodified at large election district. For a good discussion of the inherent defects see Washington, *Does the Constitution Guarantee Fair and Effective Representation to all Interest Groups Making Up the Electorate*, 17 HOW. L.J. 91 (1971).

81 PA. STAT. ANN. tit. 16 § 501 (1956).

82 Kaelin v. Warden, 334 F. Supp. 602 (E.D. Pa. 1971).

83 ILL. REV. STAT., ch. 46, § 17-13 (1971).

representatives to be elected from the area at large, and he may cast his votes in any combination for the candidates on the slate. If there are three candidates to be elected, the voter may cast all three votes for one candidate, or give one candidate two votes and give another candidate one vote, or give one vote to each of three candidates. The three candidates with the highest number of votes are the winners.

Both schemes achieve substantially similar results. With limited voting, however, almost any minority can achieve representation if there are only two definable groups, for there is no way the majority can split its votes without seriously jeopardizing the election of its candidates. If a group were to run a number of candidates greater than the number of votes each individual may cast, the probability is great that the people would spread their votes out over those candidates. Thus, the total number of votes received by each candidate would be diminished, permitting a minority supporting fewer candidates to amass more votes. The practical results are that each group runs as many candidates as each elector has votes. The largest group elects its candidates and the second largest elects the rest. A third group finds it very difficult to gain representation unless all three groups are of approximately equal weight. In this manner limited voting is one step improved over at-large voting where each is afforded the same number of votes as there are persons to be elected. Cumulative voting goes even farther. It is more responsive to a greater number of representatives. Where there are several positions to be filled minority groups can easily achieve a voice by running only a few candidates (or only one) and then voting in blocs. In this manner cumulative voting becomes very much like proportional representation.

Both plans insure that if at least two interest groups identify with candidates and can be mobilized, each will be represented. A majority group never loses control, but also never gains the sole voice in metropolitan politics. Furthermore, no matter how a minority is distributed geographically, it is still afforded a voice. Nevertheless, a geographical representative is not insured. This becomes a negative factor in consolidation plans if voters perceive a need for a community representative. Even so, if there is a significant geographical interest, it will be represented. An advantage with these two schemes is that voters themselves will select which values are most important to them. Furthermore, those communities with a similar point of view can coalesce and elect a candidate with their collective point of view whether the similar interest areas encircle the urban center or cover a more compact area.

## IX. Conclusion

The Supreme Court in the reapportionment cases of the 1960's applied the proper constitutional protection afforded individuals by the fourteenth amendment. More recent decisions indicate a trend away from the one man, one vote standard within the state and local government context. This is largely in response to several arguments that the concept is not "workable," especially in metropolitan areas. This note has shown that any impediments a strict equal

apportionment standard appears to place in the way of metropolitan consolidation can easily be overcome by employing election schemes not commonly used in the United States' political framework. Hence, there is no need for the Court to compromise the efficacy of the individual and the election framework as a whole in the name of political expediency. If local government is a viable part of representative democracy, then equal voting should mean the same thing in local elections as it does in congressional elections. Each person has as much right to a full and fair representation in local government as he does in Congress. *Reynolds* mandated that apportionment plans be devised with population as the controlling factor rather than geography or interests for the simple reason that neither interests nor acres vote, nor are they guaranteed equal protection by the fourteenth amendment. There is no adequate reason why a citizen's voting power should depend either upon the district in which he lives or upon the type of election in which he votes. Presently the Court is sanctioning just such a result. To devise a plan with a primary objective of maintaining political subdivisions and secondarily to equalize population differences abuses the equality to be afforded each individual; and when it is done without necessity, it becomes invidious.

*Timothy W. Silbaugh*